In the

United States Court of Appeals

For the Ninth Circuit

No. 15417

WALDEMAR J. GEREND,

Petitioner,

vs.

RAILROAD RETIREMENT BOARD,

Respondent.

ON PETITION TO REVIEW DECISION OF RESPONDENT RAILROAD RETIREMENT BOARD.

BRIEF OF RESPONDENT.

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ON PETITION TO REVIEW DECISION OF RESPONDENT RAILROAD RETIREMENT BOARD.

BRIEF OF RESPONDENT.

JURISDICTIONAL STATEMENT.

This proceeding is for review of a decision (R. 1-16) made under the Railroad Retirement Act (50 Stat. 307, as amended; 45 U. S. C. 1952 ed., §§ 228a-228y) by the Railroad Retirement Board, an independent agency in the executive branch of the United States Government, charged with the administration of that Act (section 10; 45 U. S. C. 1952 ed., § 228j).

The decision of the Railroad Retirement Board is subject to review by this Court under section 11 of the Act (45

U. S. C. 1952 ed., § 228k) which incorporates by reference the provisions pertaining to judicial review set forth in section 5(f) of the Railroad Unemployment Insurance Act (52 Stat. 1100, as amended by 60 Stat. 738; 45 U. S. C. 1952 ed., § 355(f)), an Act also administered by the Railroad Retirement Board.

STATEMENT OF THE CASE.

Mr. Gerend, the petitioner herein, asserts that the annuity of $123.76 awarded him by the Railroad Retirement Board is smaller in amount than he is entitled to under the provisions of the Railroad Retirement Act, principally because the Board did not, in computing his "years of service", credit him with certain months (from "midyear" 1932 through May 1938) during which he claims he performed service for the Southern Pacific Company. The Board found in its decision that Mr. Gerend was not in the compensated service of the Company during this period and that he was not, therefore, entitled to credit for this period in the computation of the annuity.

Annuities to retired employees are computed under the Railroad Retirement Act by multiplying the individual's "years of service" by certain stated percentages of his "monthly compensation" for such service (section 3(a); 45 U. S. C. 1952 ed., Supp. III, § 228c(a)).

"Years of service" is specifically defined as "the number of years an individual as an employee shall have rendered service to one or more employers for compensation or received remuneration for time lost * * *" (section 1(f); 45 U. S. C. 1952 ed., § 228a(f)). (Railroad companies generally are employers under the Act and the Southern Pacific Company is such an "employer".) An individual's "years of service" includes all his service after 1936 (referred to as "subsequent service") and, if that is less than

30 years, and if the individual, like Mr. Gerend, was "an employee' on August 29, 1935,[1] the "enactment date" of the Railroad Retirement Act, the "years of service" include also his service before 1937 (referred to as "prior service") (section 3(b); 45 U. S. C. 1952 ed., Supp. III, § 228c(b)). If "prior service" is included, the total "years of service" that may be credited is 30 (*id.*). Where only part of his service before 1937 is included, it must be taken in reverse chronological order beginning with the last calendar month of such service (*id.*).

"Monthly compensation" is defined as:

> "* * * the average compensation paid to an employee with respect to calendar months included in his 'years of service', except (1) that with respect to service prior to January 1, 1937, the monthly compensation shall be the average compensation paid to an employee with respect to calendar months included in his years of service in the years 1924-1931 * * * *Provided, however,* that where service in the period 1924-1931 * * * is, in the judgment of the Board, insufficient to constitute a fair and equitable basis for determining the amount of compensation paid or attributable as paid to him in each month of service before 1937 * * * the Board shall determine the amount of such compensation for each such month in such manner as in its judgment shall be fair and equitable." Section 3(c); 45 U. S. C. 1952 ed., Supp. III, § 228c(c).

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1. The Board was able to consider petitioner as an "employee" on this date, even though it found that he was not in the compensated service of the Southern Pacific at that time, because of a specific provision in the Act (section 1(d); 45 U. S. C. 1952 ed., § 228a(d)) under which an individual is considered as having had an "employment relation" on that particular date (and, hence, entitled as an "employee" to credit for "prior service") by reason of six months compensated service to any "employer" (not necessarily the individual's last employer before the enactment date) in the period between the enactment date and 1946. See the further discussion of this point in respondent's reply to petitioner's Point 1-B, *post,* page . . .

(It may be noted, by way of explanation, that service before 1937 was treated differently from subsequent service for purposes of the calculation of the average monthly compensation and number of years of service allowable, because it was in the year 1937 that the present railroad retirement system was set up by Act of Congress and taxes for the support of the system first began to be collected, payable only with respect to service after 1936 (50 Stat. 435, 437, (Cod. of Internal Revenue Laws, (1938) §§ 1500-1536.)

Very briefly, the present case arises out of the following circumstances of Mr. Gerend's career:

In September 1926 Mr. Gerend, then a general clerk and secretary earning $265 a month (R. 58) in the executive department of the Southern Pacific Company, where he had been employed for many years, stopped working altogether for that Company and began a long employment under Mr. Paul Shoup (R. 76-77, 91-93). Mr. Shoup at that time was Executive Vice President of the Southern Pacific Company, but, in employing Mr. Gerend, it was clearly understood he was not doing so as an officer of the Southern Pacific (R. 171,172). Mr. Gerend was made secretary and manager of an association or company newly organized by Mr. Shoup for the purpose of providing a stock investment vehicle for officers (and, perhaps, later for employees) of the Southern Pacific Company (R. 76-77, 91-93, 172).

This newly organized company appears to have been known as the Railroad Securities Company. There is no evidence or indication in the record that this company was in any sense a subsidiary of Southern Pacific Company, although the principal stock that was to be purchased, at least according to the original plan (R. 172), was Southern Pacific stock. Mr. Shoup was Executive Vice President of the Southern Pacific Company in 1926 (he became President in 1929) but according to petitioner, Mr. Sproule,

the then President, and the directors of the Southern Pacific were opposed to and would not allow that Company's participation in the stock purchasing enterprise (R. 172).

Mr. Gerend was employed in the affairs of this Securities Company until its dissolution, which he says took place as of December 31, 1936 (R. 126). Along with this work Mr. Gerend "from the beginning" took "care of all personal business matters" of Mr. Shoup on the West Coast (R. 92) which apparently were considerable and involved among other things a company wholly owned by Mr. Shoup called the Los Altos Company (R. 85), the activities of which are not shown in the record. This arrangement, according to Mr. Shoup, in a letter (R. 91-93; Appdx. 33) written by him in June 1938 in New York to Mr. A. D. McDonald, the President of the Southern Pacific, served the purpose of minimizing the expenses of the stock purchasing organization and at the same time "fitted well into my own affairs" (R. 92). All of Mr. Gerend's employment through these years was on "matters referred to him by Mr. Shoup" (R. 86). Mr. Gerend admittedly performed no service at all for the Southern Pacific for over five years after September 1926 (R. 84) and no further service by him to the Southern Pacific was contemplated (Pet. Br. 20) when he stopped working for that Company (except for the possibility that he might want to return to the full time employment of the Company at some future time). He was nevertheless continued throughout this time on the payroll of the Company at the rate of $25 a month (reduced to $22.50 for some nine months after 1931 according to petitioner's statement in his brief (Pet. Br. 12)), and this monthly payment was made to him until June 1, 1938 (R. 79) when Mr. Shoup retired (R. 77). (When at that time, because of Mr. Shoup's retirement, it was no longer possible for him to have Mr. Gerend kept on the Company payroll, Mr. Shoup increased the monthly salary that he paid

Mr. Gerend by that amount (R. 90).) Mr. Shoup stated in the letter of June 1938, referred to above, that the understanding had been that "this (the monthly $25 payment to Mr. Gerend) was the company's contribution to the enterprise" (R. 92). In this letter Mr. Shoup also stated that the purpose of keeping Mr. Gerend on the payroll was to preserve his free railroad transportation privileges, "possible pension if he returned to service, and so on" (R. 91). (Mr. Gerend mentions also as reasons for this arrangement, "continuance of hospital membership" and "continuance of group insurance" (R. 86; and Pet. Br. 20)). That there was some thought that Mr. Gerend might return to the Company's employment if the stock purchasing organization did not succeed is further indicated by Mr. Shoup's statement that the "venture was more or less experimental" (R. 91).

Mr. Gerend asserted before the Board that from midyear 1932, when Mr. Shoup was appointed Vice Chairman of the Southern Pacific Company with headquarters at New York, until June, 1938, when Mr. Shoup retired from the Company's service, he, Mr. Gerend, performed certain small tasks for Mr. Shoup which involved Southern Pacific business or affairs (R. 84). In his brief here he further asserts that he and Mr. Shoup agreed in 1932 that thereafter the $25 a month payment was to be considered as compensation for these tasks (Pet. Br. 21).

SUMMARY OF ARGUMENT.

Congress has provided that in the absence of fraud, findings of the Railroad Retirement Board in cases of this kind are conclusive, and are to be disturbed on review by the courts only if not supported by evidence.

The evidence of record strongly supports the Board's finding, which the petitioner questions, that petitioner did not perform services for the Southern Pacific Company as an employee in any part of the period from September 1926 through May 1938, and that the $25.00 a month that he received from the Company during this whole period was not intended as, and was not remuneration for, any service he may have performed. By petitioner's own admission the payment was not so intended when it was first begun and he admits also that it was not so intended for more than five years thereafter and that during this period he performed no services for the Company to which it could conceivably be related.

His claim that after mid-year 1932 he did perform some compensated services for the Company as an employee (he himself describes them as being of a "nominal" character), and is entitled to credit therefor in the computation of his annuity, is supported only by his own contradictory testimony and by the statement by one other employee made for the purpose of aiding the petitioner's claim. On the other hand, the Board had before it the report of an official of the Company that its records do not show that petitioner performed any service for the Company during the period in question, and a letter written in 1938, long before petitioner filed his application for an annuity, by Mr. Shoup, the Company official under whom petitioner alleges that he performed the claimed services, which letter strongly indicates that throughout the period in question petitioner was exclusively engaged in work for

Mr. Shoup personally, or in business enterprises of Mr. Shoup having nothing to do with Southern Pacific business. Mr. Shoup's letter showed that the payment of $25.00 a month to the petitioner by the Southern Pacific was the Southern Pacific's "contribution" to the enterprise in which he personally engaged and, to preserve his pass privileges, and, if he returned to the Southern Pacific's service, to preserve his pension rights.

Most of the "points", numbered 1-A to 1-E, respectively, under which petitioner's arguments are made in his brief are meaningless or irrelevant in the light of what was done in the handling of this case by the Board, and in the light of the plain provisions of the law. Thus, his point 1-A that "undue prejudice" was exhibited against him by the Board's Bureau of Retirement Claims in refusing his "proffer" that the period from September 1926 to December 31, 1931 be excluded from the 1924-1931 "test-period", used in determining his average monthly compensation for all months prior to 1937, is meaningless and without point since that period was omitted by the Board in computing his annuity. Petitioner's annuity has been computed in this way ever since he revealed, following the initial decision by the Board's Bureau of Retirement Claims, that he had not performed any service for the Company during this period.

Again, petitioner's point 1-B, that the Board erred in that it did not find petitioner to be in the "employment relation" on the enactment date under the definition of that term contained in the Act before its amendment in 1946, is meaningless since the Board did find that under the amended definition he was in the "employment relation" on the enactment date and, therefore, entitled to credit for any otherwise creditable service before 1937. Since the only purpose under the Act of finding that an employee was in the "employment relation" on the enact-

ment date is that in such event his service before 1937 may be credited, and since the Board found that petitioner was in the "employment relation" and thus that his service before 1937 could be credited, his point is without purpose.

Again, petitioner argues in his point 1-E that his annuity would have been larger in amount had the Board credited him with $160.00 a month for his ten months of military service in World War I, as provided in section 4 of the Act. The record shows, however, that the Board credited petitioner with average monthly compensation for all months before 1937 far in excess of $160.00 a month, so that the only result of including the $160.00 credit in the computation would have been to reduce his average monthly compensation and so, his annuity. Petitioner, it is to be noted, was given credit for all ten months of his military service for purposes of his "years of service" (the other factor in determining the amount of an individual's annuity).

Similarly, in his point 1-F he argues the correctness of the Appeals Council discussion of the import of Mr. Shoup's letter of 1938, overlooking the fact that the Appeals Council is an intermediate appeals unit within the Board, that he appealed from its decision to the Board itself, and that the decision of the Board obviously superseded the decision of the Appeals Council.

Petitioner's argument (point 1-C) that section 8 of the Railroad Retirement Act does not, because of the lapse of time, permit the Board to find that he did not perform compensated service for the Company where the Board's records show that the compensation was reported by the Company to the Board more than four years ago, ignores the explicit wording and plain intent of section 8 which shows that it applies only with respect to compensation

"paid to an employee" and does not apply to or bind the Board at all.

Petitioner's point 1-D, that the Board and its employees denied him a fair hearing on his claim is not true. He was given an opportunity for an oral hearing and did not accept it. He never indicated he desired to cross-examine anybody. He did not complain until now that the Board obtained and considered a statement from the Company as to what petitioner's record at the Company contained, or that it should have been shown to him. There is nothing whatsoever to support his assertion that the Board cut short his opportunity to present further evidence. His charge that the Board did not answer some of his questions is largely based on the fact that the Board did not argue with him and did not answer (because answer obviously was not required) some of his rhetorical questions which obviously were in the nature of argument. Finally, his charge that the Board refused to "clarify" his employment record in 1945 (long before he applied for an annuity) ignores the fact that he did not then advise the Board that there was anything unusual about his case that would require such action on its part.

ARGUMENT.

I.

THE BOARD'S DECISION IS TO BE AFFIRMED IF IT IS SUPPORTED BY EVIDENCE AND IS NOT INCORRECT IN LAW.

Section 11 of the Railroad Retirement Act (45 U.S.C. 1952 ed. sec. 228k) which authorizes this action, incorporates the judicial review provisions of section 5(f) of the Railroad Unemployment Insurance Act (52 Stat. 1100, as amended by 60 Stat. 738; 45 U.S.C. 1952 ed. § 355(f)). Thus the specific statutory provision governing judicial review of the decision of the Railroad Retirement Board here complained of, is:

> "The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive."

The Courts have held in accordance with the plain meaning of the quoted provision, that upon judicial review of a decision of the Board on a claim for benefits under the Railroad Retirement Act, the Board's decision is not to be disturbed if it is supported by evidence in the record and not based on an error of law. *Monahan* v. *Railroad Retirement Board,* 183 F. 2d 366 (C. A. 7, 1950); cert. denied, 340 U. S. 854 (1950); *Wheeler* v. *Railroad Retirement Board,* 184 F. 2d 173 (C. A. 8, 1950); *Squires* v. *Railroad Retirement Board,* 161 F. 2d 182 (C. A. 5, 1947); *Lane* v. *Railroad Retirement Board,* 185 F. 2d 819 (C. A. 6, 1950); *Marr* v. *Railroad Retirement Board,* 206 F. 2d 47 (C. A. 4, 1953).

II.

THE BOARD'S DECISION THAT THE PERIOD FROM MID-YEAR 1932 UNTIL MAY 1938 WAS NOT TO BE INCLUDED IN PETITIONER'S "YEARS OF SERVICE" IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AND IS CORRECT IN LAW.

The Board held that although Mr. Gerend, the petitioner, was on the pay roll of the Southern Pacific for $25.00 monthly from September 1926 until May 1938 (R. 77), these payments were not for service rendered to the Southern Pacific and that no part of this period was to be included in Mr. Gerend's "years of service" (R. 16).

Mr. Gerend, as stated above, admits the correctness of this finding as respects the earlier years of the period (September 1926 to midyear 1932) that these pay-roll payments were made (Pet. Brief 20, R. 72, 151). He claims, however, that the $25.00 payments from mid-year 1932 until May 1938 should be regarded as compensation for services rendered to the Southern Pacific and that period included in his "years of service" because, he has asserted, during this period he performed some services for the Southern Pacific which he describes as of a "nominal character", largely consisting of "delivering word from Mr. Shoup to business associates regarding political and legislative matters" (R. 84). And in his brief herein, he further asserts (Pet. Br. 21) that in 1932 he and Mr. Shoup agreed that thereafter the $25.00 which he had been receiving for other reasons was to be considered as compensation for these tasks.

(This assertion of a new agreement was made in a letter (R. 180-192) which Mr. Gerend wrote to Mr. Sherman Adams (Assistant to the President of the United States) after the Board's decision on his appeal; aside from that

instance, this assertion is made by Mr. Gerend for the first time in his brief before this Court.)

In addition to his own assertions, there is only a statement by Mr. J. W. Ferguson, who was Mr. Shoup's secretary in New York, and a statement of Mr. D. J. McGanney, who is now vice president of the Southern Pacific Company, to support his claim that he did perform any such tasks. Mr. McGanney's statement (R. 205-206) was submitted only after the Board had already rendered its decision in this matter. Mr. McGanney made a statement in general terms, that *a review of Mr. Gerend's file* (without indicating the nature of the material or records in the file) confirmed Mr. Gerend's contentions set forth in a letter by Mr. Gerend to Mr. McGanney, including his claim that he had performed railroad tasks for Mr. Shoup pursuant to their understanding that the $25.00 would thereafter be considered pay therefor. This statement by Mr. McGanney is directly contrary to the statement made by Mr. H. E. Alsing, Secretary of the Board of Pensions of the Southern Pacific, who reviewed Mr. Gerend's company file in 1954 and stated that *there was nothing in the file* to show that Mr. Gerend performed any work for the railroad (R. 77). Moreover, Mr. McGanney's blanket confirmation of Mr. Gerend's statement is made almost meaningless by his statement in the same letter that "all of these subjects have been quite fully covered and cognizance taken of them in the Railroad Retirement Board's decision which I have also read * * *".

Mr. Ferguson's statement (R. 127-128) is the only corroborative evidence of any value that Mr. Gerend submitted to the Board, corroborative, that is to say, that some small tasks involving Southern Pacific work, which Mr. Gerend described as some errand running and message carrying (R. 84), were done by Mr. Gerend incidental to the other work that he did for Mr. Shoup; Mr. Ferguson

does not corroborate Gerend's claim that there was a new agreement in 1932 that the $25.00 monthly payments should thereafter be considered pay for these little tasks. The suggestion by Mr. Ferguson and by Mr. Gerend that Mr. Shoup had to rely on Mr. Gerend for these little tasks, because he did not have a staff of his own in San Francisco after he went to New York in 1932, is somewhat incredible in view of the fact that the headquarters of the Southern Pacific Company, with many employees available, have always been in San Francisco. Mr. Gerend seems to explain this by the suggestion (R. 171, 173) that there was some difficulty between Mr. Shoup and the officers of the Southern Pacific Company at San Francisco.

The evidentiary value of Mr. Gerend's own testimony is considerably lessened by the circumstance that he had first claimed credit for "service rendered" to the Southern Pacific for the whole period from September 1926 to December 1936 (R. 21-22). He advanced the information that he performed no service to the Southern Pacific Company during the first five years for the $25 a month it paid him, only after it was made clear to him that the inclusion of such low earnings in the 1924-1931 "test period" had the effect of reducing the average monthly compensation for all his service before 1937, thus reducing the amount of his annuity to the $109.68 figure first awarded him by the Board's Bureau of Retirement Claims (R. 61-62). Moreover, even after he renounced credit for the period from October 1926 to mid-year 1932, and admitted that he was not an employee in this earlier period, he did not state, in answer to a specific question put to him by the Board's Appeal Council, as to *why* he was paid $25 a month from October 1926 through May 1938 (R. 83), that he and Mr. Shoup had agreed in 1932 that the $25 was thereafter to be considered compensation for those "nom-

inal'' tasks which he says he then began performing. His answer was only:

> ''Primarily as a retainer while on a special full time outside employment assigned by Mr. Shoup—and a gesture to maintain employment relationship which would justify
>
> Issuance of transportation
> Continuance of Hospital membership
> Continuance of Group Insurance
>
> with the ultimate objective of being returned (or being eligible) to full time Railroad employment'' (R. 86).

The records of the company, according to Mr. Alsing, give no indication at all that Mr. Gerend performed any services of whatever nature, ''nominal'' or otherwise, for the railroad (R. 76-77).

Moreover, the record contains a copy of a letter (R. 91-93; Appdx. 33) dated June 8, 1938 from Mr. Shoup to Mr. McDonald, then President of the Company, in which Mr. Shoup, who was about to retire, explained in detail the arrangement under which Mr. Gerend left his job as general office clerk with the Company in 1926. In this letter Mr. Shoup was requesting the reemployment of Mr. Gerend by the Company and in it he obviously advanced the strongest arguments available to him why the Company should reemploy Mr. Gerend in 1938 upon Mr. Shoup's retirement. If Mr. Gerend had been a part-time employee of the Southern Pacific as he contends, working under the immediate direction of Mr. Shoup, and had his employment with the Company in fact continued through all these years from 1932 to 1938, as he contends, this letter would have given some hint of such fact for such circumstance would surely have entitled Mr. Gerend to some additional consideration from the Company. The fact that this letter does not contain any indication that

Mr. Gerend had worked for Mr. Shoup with respect to Southern Pacific matters during the preceding six years clearly indicated the complete lack of substance in Mr. Gerend's claim that he performed such tasks as a Southern Pacific employee, or his claim that he performed them under an agreement with Mr. Shoup that the $25 a month payment was to be considered thereafter as remuneration by the Southern Pacific for such services. As a matter of fact, the language used by Mr. Shoup in this letter (reproduced in the Appendix hereto, p. 33) suggests, on the contrary, that there was absolutely no change after midyear 1932 when Mr. Shoup's headquarters were transferred from San Francisco to New York.

Mr. Shoup stated specifically that "after my transfer to New York, the arrangement was continued", indicating rather clearly that there was no change in the purpose for which the monthly payment of $25 was being made. He went on to state that "the affairs of the stock purchasing enterprise were not wound up until some time prior to June 1938," and that "there was then no immediate opportunity for Mr. Gerend to return on any satisfactory basis to the Southern Pacific service", thus, again indicating he did not understand that Mr. Gerend had returned to the service of the company in 1932. He stated, moreover, that Mr. Gerend had been continued on the payroll at $25 per month "pending determination of his future work" and that after Mr. Shoup's retirement from service he found no opportunity under which he could recommend Mr. Gerend's continuance on the payroll. Mr. Shoup recommended that Mr. Gerend be treated thereafter as a furloughed employee subject to reemployment and that he be given preferential opportunity to again join the active service of the Company when any suitable vacancy presented itself. The language used throughout Mr. Shoup's letter clearly shows that he never considered

Mr. Gerend to have been in the service of the Southern Pacific Company during the period that he was carried on the payroll at $25 a month.

Even assuming that Mr. Gerend did perform a few "nominal" tasks, errands and the like, which involved Southern Pacific interests (too confidential for him to reveal to the Board even today (Pet. Br. 8)), the assertion by him in his brief (Br. 21-22) that the $25.00 monthly payments from the Southern Pacific were compensation for those errands is not supported by evidence aside from Mr. Gerend's own testimony. In other words, there is nothing, aside from Mr. Gerend's own statement (and this allegation was never made during the process of adjudication of his claim, even while on appeal, but was made for the first time in a 13 page letter (R. 180-192) dated May 13, 1956, which Mr. Gerend, after the Board's decision on his appeal, wrote to Mr. Sherman Adams, Presidential Assistant, and which letter was referred by Mr. Adams to the Board) to indicate that the payment of the $25.00 monthly was for a different reason or reasons after 1932 from the reasons for which Mr. Gerend was put on the pay roll at that figure in 1926.

This fact should be considered in the light, too, of another circumstance. Mr. Shoup was the head of Railroad Securities Company, as well as Chairman of the Southern Pacific. Railroad Securities Company was a stock-holding association or corporation, and the stock held was principally Southern Pacific. If Mr. Gerend performed some "nominal" errands for Mr. Shoup, involving Southern Pacific affairs, as he claims, at the same time that he was employed by Mr. Shoup in Railroad Securities Company affairs, and in personal business affairs of Mr. Shoup, it is certainly unlikely that in the performance of these nominal tasks Mr. Gerend changed employers in any respect, that is, that he did not continue throughout to

work for Mr. Shoup as the head of Railroad Securities Company, or for Mr. Shoup in connection with his personal activities or business. This conclusion fits well, of course, with the circumstance, described by Mr. Gerend himself, that when he left the job he had been performing with the Southern Pacific in 1926 to go to work for Mr. Shoup in the stock-purchasing plan, the then President of the Southern Pacific, William Sproule, "made it a point to declare" that Mr. Gerend was not thereafter to be considered an employee of the Southern Pacific Company but as an employee of Paul Shoup (R. 185).

The Six Points Set Forth and Argued in Petitioner's Brief to Support His Petition Are Either Irrelevant and Immaterial or His Assertions Thereunder Are Not Supported by the Record.

Petitioner's argument is divided into six points, numbered 1-A to 1-F, respectively. These are answered in order as follows:

POINT 1-A.

> "Did the Board commit an initial error of undue prejudice with respect to appellant, when it refused his proffer (Transcript, p. 67) of 'Why not skip the 10/1/26 to 12/31/31 period entirely.' "

This is the period during which Mr. Gerend was not, by his own admission (R. 151), an employee of the Southern Pacific and performed no service for it although he was on its payroll at $25 a month. (This period is now generally referred to by Mr. Gerend as extending to mid-year 1932.)

Actually, neither the Board nor its intermediate appeals unit, the Appeals Council, ever included this period in computing Mr. Gerend's "years of service" and the Board's

communications to him informed him that it was not included on numerous occasions (R. 16, 96-97, 119, 140-145). Yet he has persistently argued that the Board should exclude this period from the "test period" (1924-1931) which is used to determine average monthly compensation for all service before 1937.[1] It is true that the initial award made to Mr. Gerend in October 1953 by the Board's initial adjudicating unit, the Bureau of Retirement Claims, used the whole 1924-1931 test period to determine Mr. Gerend's average monthly compensation before 1937 (R. 65) but this was upon the basis of Mr. Gerend's original "Statement of Compensated Service Rendered Prior to January 1, 1937 to Employers Under The Railroad Retirement Act of 1937" (R. 21) which indicated that he had performed service as an employee of the Southern Pacific during this whole period. Mr. Gerend's excuse is that he "obeyed the letter of the law" in that he "reported all compensation from Railroads subject to the Act, and all payroll periods during such compensation was paid" (R. 168-169). The Board's form on which he made his original claim of service does not ask for statements of remuneration received, however, but, in plain language, statements of service performed (R. 21). Mr. Gerend was quick enough to recognize that he had not performed any service to the Southern Pacific between September 1926 and midyear 1932, when it was made clear to him that the inclusion of this period in his record as a period of service, with credit for only $25 a month compensation, would have the effect of reducing his annuity sharply by reducing his average monthly compensation.

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1. Average monthly earnings before 1937 are, under section 3(c) of the Act (quoted in relevant part above on page 3), deemed to be the same as the average monthly earnings in periods of employment during this "test period", except where employment in the "test period" is, in the judgment of the Board, insufficient to constitute a fair and equitable basis for this purpose.

In the light of these circumstances, the charge of "undue prejudice" in refusing "his proffer" is meaningless.

POINT 1-B.

> "Did the Board err when in effect it ruled that appellant qualified to obtain credit for prior to January 1, 1937, service and compensation *only* because he had been qualified by Sec. 1(d)(ii) of the Railroad Retirement Act, and not because he had been in employment relation on August 29, 1935, prior to adoption of amendment to the original Railroad Retirement Act now shown as Sec. (d)(ii) and expressed by the language 'before 1946 in each of six calendar months.' "

This point is as empty and irrelevant as the first. Since the Board allowed Mr. Gerend credit for his "prior service" (service before 1937), it impliedly found that Mr. Gerend was an "employee" on August 29, 1935, "the enactment date" of the Railroad Retirement Act (section 1(j) of the Act; 45 U. S. C. 1952 ed., § 228a (j)) for otherwise it could not have allowed him credit for any of his prior service. Section 3(b) of the Act; 45 U. S. C., 1952 ed., Supp. III, § 228c (b). But the term "employee" is specifically defined in the Act (section 1 (b); 45 U. S. C., 1952 ed., § 228a (b)) to include not only persons "in the service" of a covered employer, but also persons "in the employment relation to one or more employers". This term, "employment relation" (*which is used in the Act only in connection with the crediting of "prior service" and has no other function*), is defined (section 1(d); 45 U. S. C. 1952 ed., § 228a (d)) to include, among others, an individual who was "in the service" of an employer after the enactment date and before January 1946 in each of six calendar months, whether or not consecutive. Thus, it is incontrovertibly plain that Mr. Gerend (who was reemployed by the Southern Pacific in 1942 and continued to work for the Company until 1953) was an "employee" on

August 29, 1935, because of having acquired, through service in six months after that date and before 1946 an "employment relation" status, which could have been acquired by six months service before 1946 for any "employer", not necessarily the former "employer". By having this status, Mr. Gerend, as the Board found, had acquired the right to have "prior service" credited. It was therefore wholly unnecessary, as Mr. Gerend urges should have been done, for the Board to have found Mr. Gerend to have been in the "employment relation" (and thus an "employee on the enactment date" for purposes of crediting his "prior service") under the definition of "employment relation" which was contained in the Act before this term was amended (60 Stat. 722, 725, (section 201); 45 U. S. C., 1952 ed., § 228a (d)) in 1946. Before the amendment of 1946 the Act provided that an individual was in the "employment relation" on the "enactment date" if he was "on furlough, subject to call for service within or outside the United States and ready and willing to serve, or on leave of absence, or absent on account of sickness or disability; all in accordance with the established rules and practices in effect on the employer * * *." 45 U. S. C., 1940 ed., § 228a (d). This provision was wholly superseded as to future awards when the 1946 amendments were enacted. 60 Stat. 722, 742, section 404 (45 U. S. C. 1952 ed., note following § 228a). Hence, it could not possibly have application in Mr. Gerend's case.

But even if it did, if the earlier definition of "employment relation" were not superseded, and, even assuming that under the earlier definition also Mr. Gerend would have been found to have an "employment relation" on the enactment date, it would be of no significance to the issue here, which is solely concerned with the reasonableness of the Board's finding that Mr. Gerend was not "in the service" of the Southern Pacific during any of those years when he was being paid $25 a month.

Point 1-C.

"Does the Board have a legal restraint (a statute of limitations) imposed upon it by the Railroad Retirement Act, and in particular by Sec. 8, to alter its records (and order accrual of annuities on basis of such altered records) of tax paid compensation and employment some 20 years after such compensation and employment had been 'returned' to the Board."

Section 8[1] is expressly predicated on the premise that the compensation record is that of an "employee". If the "Board's records of compensation so returned" for a period actually pertains to an individual who was not an "employee" during the period, section 8 obviously can have no application. This is especially so since the matters as to which the finality attaches are "the amount of compensation paid to an employee", or "that no compensation was paid to such employee".

Moreover, this section clearly says that the Board's records of an employee's compensation shall be "conclusive" unless the "error" or the "failure" is "called to the attention of the Board" by the employee or by his employer, within four years. The burden, of finding the "error"

1. Section 8 provides as follows:

"Employers shall file with the Board, in such manner and form and at such times as the Board by rules and regulations may prescribe, returns under oath of compensation of employees, and, if the Board shall so require, shall furnish employees with statements of their compensation as reported to the Board. The Board's record of the compensation so returned shall be conclusive as to the amount of compensation paid to an employee during each period covered by the return, and the fact that the Board's records show that no return was made of the compensation claimed to will [sic] have been paid to an employee during a particular period shall be taken as conclusive that no compensation was paid to such employee during that period, unless the error in the amount of compensation returned in the one case, or the failure to make return of the compensation in the other case, is called to the attention of the Board within four years after the last date on which return of the compensation was required to be made."

or "failure" which would cause diminution of the annuity, and taking prompt action, is obviously not cast on the Board by this language but on the employee, and he (or his employer) must "call the attention of the Board" to it. The quoted language is capable of no other meaning. The section was obviously not intended to impose on the Board the task (far beyond its capabilities unless it were expanded into an organization of a size that Congress certainly never contemplated) of either auditing and checking these returns and making sure of their accuracy, or of accepting them as binding on it after four years and paying substantial benefits on the basis of such reports, even though, as here, the evidence before the Board, at the time the claim for benefits is made, shows that the person with respect to whom the compensation was reported was not in the service of the reporting employer during the period for which the compensation was reported. Section 8, it may be noted additionally, obviously refers only to current reports of compensation paid after the initiation of the railroad retirement system, that is, to compensation for "subsequent service" (after 1936) and not for "prior service" (before 1937), so that even were it applicable otherwise, section 8 could not possibly apply to the greater part of the period here involved, mid-year 1932 to May 1938.

Point I-D.

> "Did the Railroad Retirement Board's handling of appellant's claim constitute the unprejudiced hearing that appellant should be entitled to under the Railroad Retirement Act, and in accordance with the constitutional guarantee of a fair trial, *specifically* did the Board err in denying appellant a timely opportunity to examine or cross examine witnesses on testimony proposed to be used against appellant, and to submit rebuttal testimony and argument *before* a final decision was attempted or so-called 'findings' reached?"

The charge that the Board denied Mr. Gerend a "timely opportunity to examine or cross-examine witnesses" is completely without basis in the record. Mr. Gerend at no time requested or gave any indication whatsoever that he desired to examine or cross-examine anybody or even that he desired an oral hearing. As a matter of fact Mr. Gerend was specifically offered an opportunity for an oral hearing by the Appeals Council; his reply was: "Only if necessary" (R. 126) and he did not bring up the subject thereafter.

His complaint that evidence was used by the Board which he did not have the privilege of examining or commenting on (Pet. Br. 11) refers solely to a letter to the Board by Mr. Alsing, Secretary, Board of Pensions of the Southern Pacific, stating that the Company's personal record on Mr. Gerend did not show that he performed any work for the railroad in the period he was paid $25 a month from October 1926 to May 1938 (R. 76-77). The Appeals Council's decision of June 11, 1954, (R. 96-97), a copy of which was furnished Mr. Gerend (R. 95) found, on the basis of that letter, that the "Southern Pacific Company has informed the Railroad Retirement Board that there is no record which shows that during the period from October 1926 until May 1938, inclusive, the appellant performed any work for the railroad company." Mr. Gerend had plenty of time since June 1954, and before the Board rendered its decision on his appeal, to protest, but at no time did he question this statement of the Appeals Council as to what his personal record with the Company showed and at no time did he even ask to see the evidence upon which it was based. In view of this circumstance his assertion now that the use of this evidence violated his rights is scarcely worthy of notice. Cf. *Ellers* v. *Railroad Retirement Board,* 132 F. 2nd. 636, 639 (C. A. 2, 1943); *Marmon* v. *Railroad Retirement Board,* 218 F. 2d 716, 717 (C. A. 3, 1954).

Moreover, petitioner had every opportunity to submit any evidence that he desired throughout the entire course of handling of his claim by the Board and its subordinate units. Nothing in petitioner's brief (or in the record) supports the general allegation that the Board cut short his opportunity to do so.

He was not, as he asserts (Pet. Br. 9), furnished with a month by month statement of the service and compensation credited to him, as requested in his letters of December 21, 1953 (R. 71) and February 28, 1955 (R. 118), but in response to the later letter he was furnished with an only slightly less detailed statement (R. 119) and it is apparent from the language of this letter that the Director of Retirement Claims who wrote it sincerely believed that he was furnishing information which would satisfy Mr. Gerend's request. (The reason his first request was not answered was, obviously, that with his letter requesting the Bureau of Retirement Claims for the information (R. 71) he sent his appeal from the decision of the Bureau to the Appeals Council (R. 72) which in effect took the matter out of the hands of the Bureau.) Actually, Mr. Gerend even now disputes (Pet. Br. 9) the record of only one month's reported compensation (August 1924), an item which could affect the amount of Mr. Gerend's annuity only infinitesimally.

His complaint (Pet. Br. 9) that the Board failed to explain or define some of the phrases that it used in its decision ("any work", "essential difference") really amounts to nothing more than a complaint that the Board refused to join him in his prolonged argument on the merits of his claim. Thus, his complaint that the Board's General Counsel refused to "enlighten appellant as to the legal points contained in letter of February 24, 1957 * * *" (Pet. Br. 13-15a) refers to an argumentative letter (id.) which he addressed to the General Counsel after he had

filed his petition for review in this court. Although he couched his arguments in the form of questions, his reference to them as a request for enlightenment is pure euphemism.

His charge (Pet. Br. 3) that the Board refused to give him a "lucid and full statement as to its policy" on using less than the whole 1924-1931 "test period", for determining the average monthly compensation applicable with respect to service before 1937 is, as has been pointed out above under his "Point I-A", without any meaning, since it was explained to him that in computing his annuity both the Appeals Council and the Board took into consideration only the months from January, 1924 to September, 1926, when he was paid an average monthly salary of $232.55, and did not take into consideration at all the months after September, 1926, in the "test period", when he was paid only $25 a month (R. 10, 119-120). Yet he persists in a meaningless argument (Pet. Br. 4) that the Board has the authority, if it would, upon his request to eliminate periods of low earnings from the "test period", 1924-1931.

Again, he accuses the Board (Pet. Br. 9) of a "refusal to answer queries", citing pages 168 and 171 of the record. The questions to which he refers, appearing in an eight page hand-written letter (R. 168-175) teeming with abuse for the Board and its employees, would be construed by any impartial reader as rhetorical in every sense of the word. Justifying his original claim of service during the entire period from October 1926 until 1938, he argued speciously he had merely "obeyed the letter of the law" and asked: "I wonder what your people feel I should have done?" (R. 168). Asserting that his previous statement, that the services performed by him involving Southern Pacific work in the period from midyear 1932 until 1938 were merely "nominal", was in response to "idiotic cross examination questions" by the Appeals Council, he asked:

"What could any reasonable person expect me to have performed in the way of RR service for $25 a month, other than that of a wholly nominal character" (R. 171). The failure of the Board to answer these questions, then, is another of the ways in which, in Mr. Gerend's view, the Board deprived him of his constitutional right to a fair hearing.

Another aspect of Mr. Gerend's charge that the Board did not properly consider his case involves the refusal of the Bureau of Retirement Claims to comply with Mr. Gerend's suggestion (it was hardly more than that) in his letter of October 27, 1945, (R. 33) that the "individuals with whom I was associated in those years" (a phrase which was not explained) were reaching "advanced age, so if their corroboration is required, steps in that direction should be taken without unnecessary delay." Mr. Gerend was informed (R. 34) that since there were over a million and a quarter persons whose claims for prior service had to be adjudicated, the Board was not undertaking at that time the handling of the prior service record of any person under 50 years of age, and since Mr. Gerend had not reached that age, his request could not be complied with at that time. It is important to note here that Mr. Gerend's letter had given no inkling of any special need for early investigation. His statement that the individuals with whom he was associated were reaching "advanced age" did not in itself indicate the necessity for any immediate investigation outside the Company's payroll since that payroll would provide presumptive proof of service and compensation in the absence of anything to the contrary.

In all but a relatively small number of cases there is no evidence to the contrary, and the Board therefore relies and acts upon that presumption, for which since 1946 it has specific statutory authority (60 Stat. 738, sec. 2, 45 U. S. C. 1952 ed. § 288a (h)) without making any

special investigation. The Board's Bureau of Retirement Claims did so in this case: as pointed out above, it was only after Mr. Gerend protested the initial award to him, which credited him with thirty years of service, including credit for all the months here in controversy (R. 65-66) that the Board learned that Mr. Gerend had been put on the payroll of the Southern Pacific for reasons having nothing to do with actual service (R. 72, 75-77). In his letter of October 17, 1945 (R. 33), he gave no indication of this or that his case was in any way unusual, a quality thereof which he has repeatedly emphasized in later communications, nor did he indicate, as he later stated (R. 104a), that even at that time he foresaw that the Board would "make trouble" for him.

Point 1-E.

> "Is the Board formula for computing annuities that include World War I service, as favorable to the annuitants as the Railroad Retirement Act contemplates that it should be?"

This is not an issue presented by the facts of the case. Mr. Gerend argues, under this point, that the Board has denied him "some of his benefits under the R. R. Ret. Act terms", because the Board did not credit him with $160 a month for the 10 months in which he was in military service in 1918-1919. Actually his annuity would be smaller if this were done and that was the reason it was not done.

As explained at the beginning of this brief (pp. 2-3), annuities are computed under the Act by multiplying the individual's "years of service" by certain specified percentages of his "monthly compensation", both of which terms are specifically defined in some detail. The computation of Mr. Gerend's annuity was explained to him in detail in a letter dated March 15, 1955 (R. 119-120).

This letter makes it plain that in computing Mr. Gerend's "monthly compensation" the ten months of his military service and the compensation attributable thereto were not taken into consideration but the ten months were included in figuring his "years of service". Had the ten months of military service been included in figuring his average monthly compensation for months before 1937, attributing to these ten months as compensation $160.00 per month, as Mr. Gerend contends should have been done, it is obvious that the average monthly compensation of $232.55 which was actually arrived at, would have been reduced, not increased, for one does not increase a $232.55 monthly average by adding months of $160.00 earnings.[2] And although this consideration was not expressed or in so many words spelled out in the letter of explanation which was sent to Mr. Gerend, it is certainly implicit therein and should have been obvious to Mr. Gerend who last worked for the Southern Pacific as an accountant (R. 127) and who as recently as 1942 contemplated becoming a certified public accountant (Pet. Br. 24).

Point 1-F.

> "Did the Appeals Council correctly, as well as without undue prejudice to appellant, interpret the evidence it had developed, and in particular did it correctly sum up the meaning of Paul Shoup's letter of 1938 (Tr. pp. 91-93) in its decisions 5364 and 5590,

2. The inclusion of the ten months of military service and the compensation attributable with respect thereto in computing his average monthly compensation for months before 1937 would have decreased that average from $232.55 to $228.07, would have decreased his average monthly compensation for all service, both "prior service" and "subsequent service", from $258.73 to $255.39, and would have decreased the amount of his annuity from $123.76 to $122.61. If the credit of $160.00 a month for military service were included in the computation without first including it in the computation of the average for months before 1937, the average monthly computation for all Mr. Gerend's service would have been reduced, even more, to $255.07, and his annuity to $122.69.

and which decisions palpably are the basis for the Board's decisions and findings of April 13, 1956?''

The Appeals Council is an intermediate appeals unit within the Board and its decision was automatically superseded when the Board issued its own decision on Mr. Gerend's appeal from the decision of the Appeals Council. Obviously, therefore, there is no question here as to whether or not the Appeals Council ruled correctly. Moreover, as pointed out above, there is no question before this Court as to whether the Board itself ruled correctly, the only question before this Court being whether there is substantial evidence in the record to support the Board's decision and whether that decision was based upon a correct interpretation of the law.

The Board's argument that its decision was supported by substantial evidence and based upon a correct interpretation of the law is set forth above, preceding this discussion of Mr. Gerend's ''points''. It is noted here additionally only that Mr. Gerend has included in his brief two documents which are not part of the record before the Board. One of these, a ''personal record'', apparently made by Mr. Gerend in connection with an application for employment in February 1942 in which he did not indicate that he was employed by the Company from September 1926 to midyear 1932 but did indicate employment after that date, obviously must be considered, if non-record evidence may be considered, in the light of his claim before the Board in 1943 (R. 21-22) that he was in the service of the Company from September 1926 through May 1938, his May 24, 1940 letter to the President of the Company (R. 88), indicating that he did not consider himself to have been in the service of the Company in that period, and all the other evidence in this case.

The other document which he includes in his brief, and which is not part of the record in this case, is a letter by

Mr. Shoup in 1942, stating that from October 1926 to March 1941, Mr. Gerend had been employed by Mr. Shoup "not only as a personal secretary but as a business secretary" and had performed well "all the work that he had to do on my account and on account of Railroad Associates". Mr. Shoup stated that he thought "the Southern Pacific Company is fortunate in getting him *back into its service*". (Emphasis supplied.)

Mr. Gerend's point in including this letter in his brief is obscure since it only appears to support further the position of the Board that Mr. Shoup did not regard Mr. Gerend as having been working for the Southern Pacific from October 1926 to March 1941.

CONCLUSION.

Respondent respectfully submits, for the reasons set forth above, that the Court should enter a decree affirming the decision of the Board.

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Chicago, Illinois,
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